JUL 6 1953
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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BLEED THROUGH

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Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the questions presented by this appeal, files this statement in opposition to the appellant's statement as to jurisdiction. The appellee includes herein its motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of Virginia on the ground that the question raised on behalf of the appellant is so unsubstantial as not to need further argument. The matters here relied upon are more particularly stated below.

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I

The State Statute Involved and the Nature of the Case

A. The Statute

The appellant contends that Section 58-547 of the Code of Virginia, which authorizes the levying of a tax based on the gross receipts of express companies, is invalid under the Commerce Clause of the Constitution of the United States. This section is found in Article 4 of Chapter 12, Title 58, of the Code of Virginia, which deals with the taxation of "Public Service Corporations." It reads as follows:

> "Every such company, for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:
>
> "The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.
>
> "The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law."

B. The Proceedings Below

This case involves two applications of the Railway Express Agency, Incorporated, filed pursuant to Section 58-

1122, and other provisions of the Code of Virginia, for correction of assessments of certain taxes for the years 1950 and 1951 made by the State Corporation Commission of Virginia in accordance with Section 58-547 of the Code of Virginia, and for refund of such taxes. The State Corporation Commission denied the refunds by orders entered on June 16, 1952, and from those orders the appellant appealed as a matter of right to the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals of Virginia in its opinion, dated March 9, 1953 and reported in 194 Va. 757 (Ad. Sheets, No. 7), held that the tax in question was an intangible property tax and did not violate either the Commerce Clause of the United States Constitution or section 171 of the Constitution of Virginia.

C. Statement of the Case

The appellant is a Delaware corporation, engaged in interstate commerce, and its first application for tax refund involved an assessment of $70,665.68, which was based upon gross receipts earned by it in the year 1949. The second application involved an assessment in the amount of $66,454.71, which represented the 1951 tax based on gross receipts earned by the appellant during the year 1950.

The appellant is engaged in the handling and transportation of goods, wares, etc. in express service in only interstate commerce in the State of Virginia, its intrastate business in this State being carried on by a wholly-owned subsidiary, Railway Express Agency, Incorporated of Virginia.

D. The Question Presented

Does the tax imposed by Section 58-547 of the Code of Virginia violate the Commerce Clause of the United States Constitution?

II

ARGUMENT

A. The Tax Involved in This Case Is a Property Tax Thus Making It Clear That No Substantial Federal Question Is Presented.

The appellant points to the decision of the Supreme Court of Appeals of West Virginia in the case of *American Barge Line Co.* v. *Koontz,* — W. Va. —, 68 S. E. (2d) 56 in an attempt to demonstrate the importance of the question here presented. However, it fails to point out in what ways that decision is the "reverse of the conclusions of the Supreme Court of Appeals of Virginia in the case at Bar."

The case of *American Barge Line Co.* v. *Koontz, supra,* is not in conflict. The Supreme Court of Appeals of West Virginia expressly recognized the fact that water carriers operating under license of the Federal government may well be validly assessed with State taxes, and simply held that (1) there was no taxable incident under the facts presented to afford a basis for the tax, and (2) the tax imposed on the interstate business was a "privilege" tax.

The tax under consideration here is a property tax and the appellant is not alone when it pays to the locality taxes on tangible personal property and pays to the State taxes on intangible personal property and money as well as the taxes measured by gross receipts. See Chapter 12, of Title 58 of the Code of Virginia, and especially, Article 2, Railway and Canal Companies; Article 7, Steamship and Other Water Carriers; Article 8, Telephone Companies; Article 10, Water or Heat, Light and Power Companies; and Article 14, Motor Vehicle Transportation Companies in Cities and Towns.

An examination of the Articles mentioned above clearly shows that the State Legislature has established a pattern

for the taxation of certain public service corporations. The Legislature, in its wisdom, chose to label the tax on gross receipts a "State franchise tax" in some instances (see Articles 2 and 10) and a "license tax" in other instances (see Articles 7, 8 and 14), but regardless of the label the result is the same. Certain property, i. e., real estate and tangible personal property, has been segregated for local tax purposes and certain property, i. e., intangible personal property, money and the going concern value of real and tangible personal property based on gross receipts, has been set aside for State tax purposes.

As pointed out, Section 58-547 is found in Article 4, Chapter 12 of Title 58 of the Code of Virginia and Chapter 12 is entitled, "Public Service Corporations." In the case of *City of Richmond* v. *Commonwealth*, 188 Va. 600, 50 S. E. (2d) 654, the court below, in an exhaustive and able opinion by the late Mr. Justice Staples, considered the constitutional and statutory provisions which govern the assessment of the properties of public service corporations. Such a consideration readily revealed that a uniform plan for the assessment and taxation of public service corporations had been evolved, and in this connection it was said:

> "* * * Since the existing method of assessing the properties of the appellee [power] company was developed from the system prescribed for assessing the properties of *railroad companies*, we will give our attention first to the origin and expansion of the constitutional and statutory provisions relating to the taxation of railroads." (188 Va. 613, 50 S. E. 2d) 660)."

This system of taxation was placed in the Virginia Constitution of 1902 and the framers thereof, in order to make sure that the railroad tax did not violate the Federal Constitution, copied the Maine tax that had been upheld

in the case of *Maine* v. *Grank Trunk Ry.*, 142 U. S. 217. See Constitutional Debates of Virginia, 1902, p. 2671. The tax was labeled a franchise tax, but the court below, speaking of a power company in the *City of Richmond* case, made it clear that the co-called franchise or license taxes levied on public service corporations were, in effect, property taxes.

It is clear, then, that there is no conflict in the decisions of the highest courts of Virginia and West Virginia. Furthermore, it is clear that the decision of the court below is not inconsistent with the decisions of this Court. See *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653; *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80; *Ott* v. *Mississippi Val. Barge Line Co.*, 336 U. S. 169; and *Canton R. Co.* v. *Rogan*, 340 U. S. 511. Compare *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, wherein a Connecticut statute was declared to be invalid because the highest court of the State had determined that it imposed an "excise" tax.

There is absolutely no justification for the charge that "the Supreme Court of Appeals of Virginia undertook to avoid the consequences of that decision [*Spector* case] by attributing to §58-547 the label of a property tax." (Appellant's Statement as to Jurisdiction, p. 8). The case of *City of Richmond* v. *Commonwealth, supra*, was handed down in 1948 and, as already pointed out, the Supreme Court of Appeals of Virginia made it clear that the so-called license taxes levied on all public service corporations in this State were not excise or privilege taxes but property taxes. See, also, *Commonwealth* v. *Balto. Steam Packet Co.*, 193 Va. 55, at pp. 69 and 70. The *Spector* case, *supra*, was not decided by this Court until March 26, 1951.

The appellee agrees that it is well settled that the operation of the statute and not its legislative label is what gov-

erns the nature of a tax. However, the Supreme Court of Appeals of Virginia has already cast aside descriptive labels and has determined that the instant tax is an intangible property tax. It has carefully reviewed the legislative and administrative history of Section 58-547 and related statutes and has concluded:

> "* * * Like the tax imposed by Code, §58-575, which we considered in the *Balto. Steam Packet* case, it is an intangible property tax based on the augmentation in value of the physical assets of the taxpayer out of the use of these physical assets as a unit of commerce; this added value being measured by the volume of business done in this State. The physical assets of a taxpayer are said to have a dual value when used in an established going concern; a dead value, or the value of the bare tangible properties themselves; and a live value, or the intangible value which is created by the concerted utilization of the congeries of unrelated items. See *Galveston, etc., R. Co.* v. *Texas,* 210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1031; *Richmond* v. *Commonwealth,* 188 Va. 600, 50 S. E. (2d) 654." (*Railway Express Agency* v. *Commonwealth,* 194 Va. at p. 761).

Under such circumstances this Court will not upset the construction given, since there is no showing of an evasion for the purpose of avoiding a contrary ruling under the decisions of this Court. *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs.*, 332 U. S. 495, 499, and *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509, 512.

Finally, it should be pointed out that the decision of the Supreme Court of Appeals of Virginia in the case of *Commonwealth* v. *Balto. Steam Packet Co., supra,* appeal dismissed, 343 U. S. 923, did not rest upon the fact that the taxpayers were not engaged *exclusively* in interstate commerce. Rather, the decision rested, as it does here, on the ground that the statute authorized the levying of a property tax. Furthermore, the *alleged* conflict between decisions

of the highest courts of Virginia and West Virginia existed and was pointed out to this Court by the appellants in the *Balto. Steam Packet Co.* case. Therefore, the same conditions exist now as existed when this Court dismissed the appeal in the *Balto. Steam Packet Co.* case for lack of a substantial federal question.

III

Conclusion

Wherefore, the appellee respectfully submits this statement showing that the question upon which the decision of this case depends is so unsubstantial as not to need further argument, and the appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this case by the Supreme Court of Appeals of Virginia.

Respectfully submitted,

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